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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CARL GREEN MORGAN,

Defendant and Appellant.

D061751

(Super. Ct. No. SCD237774)

APPEAL from a judgment of the Superior Court of San Diego County, Peter L. Gallagher, Judge. Affirmed.

Carl Green Morgan entered a negotiated guilty plea to one count of possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and admitted having one prior serious/violent felony or strike conviction (Pen. Code,¹ § 667, subds. (b)-(i)). As part of the plea bargain, the prosecution agreed to dismiss 10 other felony counts, four misdemeanor counts and two allegations of serving a prior prison term (§ 667.5,

¹ Further statutory references are to the Penal Code.

subd. (b). Morgan, who represented himself below, and the prosecution also agreed to a stipulated sentence of 32 months in prison. The trial court sentenced Morgan in accordance with the plea bargain—the middle term of 16 months doubled under the "Three Strikes" law. The trial court awarded Morgan 186 days of custody credit.²

FACTS

On November 26, 2011, Morgan had a useable amount of methamphetamine in his possession.

DISCUSSION

Appointed appellate counsel has filed a brief setting forth evidence in the superior court. Counsel presents no argument for reversal, but asks that this court review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).

Appellant counsel has not referred to any arguable issues pursuant to *Anders v. California* (1967) 386 U.S. 738.

We granted Morgan permission to file a brief on his own behalf. He has responded, claiming he was improperly sentenced under the Three Strikes law and his appointed appellate counsel provided ineffective assistance of counsel.

² In a post-judgment motion, appointed appellate counsel successfully moved to correct Morgan's presentence custody credits. The trial court awarded Morgan an additional 62 days of custody credits for a total of 248 days of presentence custody credit.

Pointing out that in his prior conviction for residential burglary (*People v. Morgan* (Super. Ct. San Diego County, 2003, No. 173979).), he was granted probation with a condition of jail custody,³ Morgan contends the prior conviction was a wobbler (see § 17), and, therefore, the trial court improperly doubled his sentence for methamphetamine possession under the Three Strikes law in this case. The contention is without merit.

Burglary of an inhabited residence is first degree burglary. (§ 460, subd. (a).) First degree burglary is a straight felony; it is not a wobbler. (§ 461, subd. (a) (*In re Andres M.* (1993) 18 Cal.App.4th 1092, 1096, disapproved on another ground in *In re Manzy W.* (1997) 14 Cal.4th 1199, 1207, fn. 5.) Because residential burglary is a straight felony—and is not a wobbler—it cannot be reduced under section 17, subdivision (b), to a misdemeanor. (*People v. Douglas* (2000) 79 Cal.App.4th 810, 812-813.) Morgan's attempt to recast his residential burglary conviction as a wobbler because the court granted him probation on condition he serve one year in jail is unavailing. Not only does Morgan ignore that the one-year term was a condition of probation, which can be imposed for a straight felony, he wants us to rewrite the statutory scheme, which we cannot do. His reliance on the provisions of subdivision (b) of section 17 is misplaced because those portions of the statute apply only to wobblers.

³ The record indicates that in 2006, the court revoked probation and sentenced Morgan to the middle term of four years in prison in case No. 173979.

Moreover, the Three Strikes law provides that "[t]he determination of whether a prior conviction is a prior felony conviction for purposes of [the Three Strikes law] shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence *automatically, upon the initial sentencing*, converts the felony to a misdemeanor." (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1), italics added.) Therefore, the fact that a disposition results in "[t]he suspension of imposition of judgment or sentence" does not affect the conviction's validity as a strike. (§§ 667, subd. (d)(1)(A), 1170.12, subd. (b)(1)(A).)

Morgan is also precluded from challenging the doubling of his sentence for methamphetamine possession under the Three Strikes law because in this case he waived the right to appeal any "issues related to strike priors." Also, because the trial court denied Morgan's request for a certificate of probable cause, section 1237.5 precludes him from appealing the validity of the plea, including the admission of the strike allegation. (See *People v. Panizzon* (1996) 13 Cal.4th 68, 83-84.)

In sum, Morgan has not demonstrated that he was improperly sentenced under the Three Strikes law or that he received an unauthorized sentence.

Morgan contends he received ineffective assistance of counsel from his appointed appellant counsel because counsel filed a *Wende* brief. The contention is without merit.

An indigent defendant has the right to effective assistance of counsel on appeal. (*In re Spears* (1984) 157 Cal.App.3d 1203, 1210.) "The duties which appointed appellate counsel must fulfill to meet his or her obligations as a competent advocate include the duty to 'argue all issues that are arguable.'" (*Ibid.*) "[F]or an issue to be an arguable

issue on appeal it must be reasonably arguable that there is prejudicial error justifying reversal or modification of judgment." (*Id.* at p. 1211.) "[I]t is not the duty of appellate counsel to 'contrive arguable issues.'" (*Ibid.*) Here, appellate counsel appropriately found no arguable issues.

At the very least, appellate counsel has the duty to prepare a brief containing citations to the appellate record and appropriate authority. (*People v. Feggans* (1967) 67 Cal.2d 444, 447.) Counsel must set forth all arguable issues and cannot argue the case against his or her client. (*Ibid.*) These requirements were reiterated in *Wende, supra*, 25 Cal.3d at p. 436.)

Failure of "appellate counsel to raise crucial assignments of error, which arguably might have resulted in a reversal" deprives an appellant of effective assistance of appellate counsel. (*In re Smith* (1970) 3 Cal.3d 192, 202-203.) However, the fact that appellate counsel followed the procedure set forth in *Wende* is insufficient, by itself, to show appellate counsel has been ineffective.

We have undertaken an examination of the entire record pursuant to *Wende*, and we find no arguable error that would result in a disposition more favorable to defendant. Accordingly, defendant has also failed to meet his burden of proof on the issue of ineffective assistance of appellate counsel. Appellate counsel has complied fully with counsel's responsibilities, and the filing of a *Wende* brief was not unprofessional. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *Wende, supra*, 25 Cal.3d at p. 443.) Competent counsel has represented Morgan on this appeal.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.